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No. 07-542

In The
Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

v.

RODNEY JOSEPH GANT,

Respondent.

On Writ Of Certiorari
To The Arizona Supreme Court

BRIEF OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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JULY 25, 2008

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BRIEF OF NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

The National Association of Federal Defenders (NAFD) respectfully submits this brief as *amicus curiae* in support of respondent.

INTEREST OF *AMICUS CURIAE*[1]

The NAFD was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution, to indigent criminal defendants. The NAFD is a nationwide, nonprofit, volunteer organization whose membership includes attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act.

One of the guiding principles of the NAFD is to promote the fair adjudication of justice by appearing as *amicus curiae* in litigation relating to criminal law issues, particularly as those issues affect indigent defendants in federal court. The NAFD has appeared

[1] Letters from the parties consenting to the filing of this brief are being filed with the Clerk of the Court, pursuant to Rule 37.3(a). No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

as *amicus curiae* in litigation before this Court and the federal courts of appeals, providing a practical view of the federal criminal justice system as seen through the eyes of counsel who represent a majority of the individuals charged with federal crimes in districts throughout every circuit. The NAFD submits this *amicus* brief because the instant case raises an important constitutional question that will have a pervasive effect on federal criminal practice due to the frequency of searches of vehicles after the arrest of former occupants of such vehicles.

SUMMARY OF ARGUMENT

Empirical evidence from states across the country contradicts petitioner's contention that police officers will be endangered and evidence will be lost unless this Court adopts petitioner's proposed rule that would authorize police to search a vehicle *automatically*, (*i.e.*, to conduct a warrantless search without probable cause or exigent circumstances) after a former occupant is arrested, even after the arrestee is secured in a police car. The rule applied by the Arizona Supreme Court in this case held to the contrary and refused to adopt a rule that authorizes the automatic search of a vehicle incident to an arrest after the arrestee is handcuffed and secured in a police car, and several states have similarly refused to adopt petitioner's rule. Data indicate that the refusal by these states to authorize automatic vehicle searches has not placed law enforcement officers at an

increased risk of being assaulted during traffic stops in those jurisdictions. Nor has it hampered law enforcement by requiring unwieldy fact-based assessments as petitioner claims.

A. Nine states have expressly rejected the automatic vehicle search rule that petitioner contends should be imposed as the nationwide constitutional standard. The Federal Bureau of Investigation (FBI) data from these jurisdictions do not reflect an increased risk of assault on officers during traffic stops. Indeed, although the data in this instance can serve only as a rough proxy for risk, they strongly suggest that the risk of assault on police officers during traffic stops is not related to whether the officers are authorized to conduct automatic vehicle searches. This is so whether the data of the nine states that have expressly rejected an automatic vehicle search rule are viewed in the aggregate as compared to all the other states, or whether the available state-by-state data are viewed individually and compared to the rate of assaults against officers in such jurisdictions before automatic vehicle searches were outlawed.

B. The automatic search of a vehicle is also not necessary to preserve potential evidence. Officers can secure a vehicle as part of the scene at the time of an arrest to prevent access by others and thereby protect evidence that may be in a vehicle from destruction at the hands of the arrestee or third parties. Furthermore, officers remain able to recover potential

evidence from a vehicle consistent with Fourth Amendment standards where appropriate.

C. Interpretation of the Fourth Amendment to not allow automatic vehicle searches after an arrestee is secured provides a straightforward and readily manageable rule. Police officers already must evaluate when an arrestee is secured in the course of performing an arrest. *Ad hoc* determinations of the relative risks that particular arrestees pose are not required because the securing of an arrestee in a police car so diminishes any likelihood that the arrestee can reach his vehicle. It is only after the arrestee is secured that well established constitutional standards of probable cause or exigent circumstances must be met to justify the vehicle search.

ARGUMENT

THE ARIZONA SUPREME COURT'S REFUSAL TO ADOPT PETITIONER'S RULE AUTHORIZING AN AUTOMATIC SEARCH OF A VEHICLE AFTER A FORMER OCCUPANT HAS BEEN ARRESTED AND SECURED DOES NOT ENDANGER LAW ENFORCEMENT OFFICERS NOR DOES IT IMPEDE EVIDENCE PRESERVATION

Petitioner contends that the automatic search of a vehicle after a former occupant has been arrested should be deemed *per se* reasonable under the Fourth Amendment, even after the arrestee has been secured in a police car, and even though the officers do not have probable cause to believe that the vehicle

contains evidence of a crime and there are no exigent circumstances. Asserting that its proposed rule was established by *New York v. Belton*, 453 U.S. 454 (1981), petitioner attempts to justify its rule based on two broad claims. First, it posits that a search of the vehicle is "essential" in every case to protect officers and to prevent the arrestee from destroying evidence that may be inside the vehicle. Pet. Br. 12. This appears to be a claim that all arrests of vehicle occupants somehow rise to the level of exigent circumstances to justify a vehicle search, even when the arrestee is secured outside the vehicle and no identifiable exigencies exist. Second, petitioner claims that the authority to engage in an automatic vehicle search in every case provides the police with "a certain and clear [Fourth Amendment] guideline," *ibid*.

Neither rationale stands up under scrutiny. The FBI's data regarding assaults on police officers during traffic stops indicate that petitioner's assertion of officer safety needs is substantially overstated. The data show that officers in jurisdictions that have refused to adopt a rule that authorizes the automatic search of a vehicle after a former occupant is arrested and secured do not face an increased risk of assaults during traffic stops. Nor is there an increased risk of evidence being destroyed during the course of an arrest in such jurisdictions. Thus, petitioner does not, and cannot, justify a categorical determination that all vehicle arrests somehow present exigent circumstances

that make an automatic vehicle search constitutionally reasonable.

Moreover, this Court's Fourth Amendment doctrine supports the holding of the Arizona Supreme Court below and requires rejection of petitioner's automatic search reading of *Belton*. Respondent demonstrates this in his brief and correctly explains that, under this Court's precedents, the only constitutionally authorized justification for a search incident to arrest without a warrant or probable cause is an exigency such as an immediate risk to officer safety or to evidence. *See* Resp. Br. 11-12; *see also Chimel v. California*, 395 U.S. 752, 762-763 (1969). Respondent also persuasively demonstrates that any decreased expectation of privacy in a vehicle does not eliminate this requirement. *See* Resp. Br. 42; *see also Chambers v. Maroney*, 399 U.S. 42, 48 (1970). It is against this legal backdrop that this brief analyzes the FBI data regarding assaults against law enforcement officers during traffic stops.

A. Empirical Evidence Demonstrates That Police Officers Are At No Greater Risk Of Being Assaulted During Traffic Stops In The Nine States That Have Rejected Petitioner's Proposed Automatic Vehicle Search Rule

Petitioner broadly declares that all "[a]rrests are inherently dangerous," and thus police officers always have a "legitimate need to conduct the search" of a vehicle incident to an arrest of a former occupant,

even after the arrestee is handcuffed and secured in the back of a police car. Pet. Br. 12. Petitioner appears to assume that arrestees can readily escape the confinement of police cars designed to hold criminal suspects; that such arrestees will reach their own vehicles; and that, while still handcuffed, will gain access to the interior of their vehicles to grab a weapon or to destroy evidence. Such a feat certainly would require almost super-human strength and coordination. *Thornton v. United States*, 541 U.S. 615, 626 (2004) (Scalia, J., concurring). And such an arrestee would need to possess exceptional motivation to orchestrate such an armed assault rather than simply escape.

Putting aside whether petitioner's assumption is even plausible, petitioner provides no empirical support (nor does its *amici*) for the contention that the authority to conduct an automatic search of a vehicle after a recent occupant is arrested and secured is necessary for officer safety. In fact, analysis of the available empirical evidence undercuts that contention.

Although not definitive, the data on assaults against officers during traffic stops indicate that police officers do not face a higher risk of assault in jurisdictions that have rejected an automatic vehicle search rule and, instead, have adhered to well established standards of reasonableness that require probable cause or exigent circumstances.

1. The Aggregate Data From The Nine States That Have Expressly Rejected An Automatic Vehicle Search Rule Show No Increased Risk Of Assault Against Police Officers During Traffic Stops

Nine states—Massachusetts, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Vermont, and Wyoming—have expressly rejected, either as a matter of state constitutional or statutory law, petitioner's proposed rule that deems constitutionally reasonable all police searches of vehicles after an occupant has been arrested, even after the arrestee is secured.[2]

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[2] *See Commonwealth v. Toole*, 448 N.E.2d 1264, 1266-1267 (Mass. 1983) (rejecting rule that permits automatic vehicle searches incident to arrest of former occupant without showing of probable cause or exigent circumstances); *Camacho v. State*, 75 P.3d 370, 373-374 (Nev. 2003) ("under the Nevada Constitution, there must exist both probable cause and exigent circumstances for police to conduct a warrantless search of an automobile incident to a lawful custodial arrest"); *State v. Eckel*, 888 A.2d 1266, 1277 (N.J. 2006) ("[A] warrantless search of an automobile based not on probable cause but solely on the arrest of a person unable to endanger the police or destroy evidence * * * is unreasonable."); *State v. Arredondo*, 944 P.2d 276, 284 (N.M. Ct. App. 1997) (reiterating that New Mexico's Constitution rejects "bright-line" rules permitting automatic searches of vehicles in favor of a "fact-specific inquiry" into search's reasonableness) (quoting *State v. Gomez*, 944 P.2d 276, 284 (N.M. Ct. App. 1997)); *People v. Blasich*, 541 N.E.2d 40, 43 (N.Y. 1989) (Although vehicle search may be permitted under other exceptions, the search-incident-to-arrest exception does not permit automatic search of vehicle but is "limited to arrestee's person and the area from within which he might gain possession

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These nine states are not grouped in any one region but are spread across the country and they contain nearly 20% of the country's population. United States Dep't of Commerce, *Statistical Abstract of the United States*: 2008, at 21. These states provide an opportunity to examine empirically whether the automatic vehicle search rule is key to officer safety, as petitioner contends, and the data demonstrate that it is not. The experience in these states suggests that rejection of an automatic vehicle search rule does not place police at a greater risk of being assaulted during a traffic stop.

For purposes of this analysis, the state-by-state data underlying the FBI's *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted*, was obtained from the FBI. The number of assaults on law enforcement officers during traffic stops and

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of a weapon or other destructible evidence."); *State v. Fesler*, 685 P.2d 1014, 1016 (Or. Ct. App. 1984) (rule allowing automatic vehicle searches incident to arrest of former occupant does not satisfy the Oregon constitution (citing *State v. Caraher*, 653 P.2d 942 (Or. 1982)); *Commonwealth v. White*, 669 A.2d 896, 901-902 (Pa. 1995) (absent showing of exigency, arrest of vehicle's former occupant does not alone permit search of vehicle under state constitution, even though such is permissible under Fourth Amendment); *State v. Bauder*, 924 A.2d 38, 46-47 (Vt. 2007) (rejecting *Belton* and holding that warrantless vehicle search incident to arrest of former occupant is unreasonable without showing that arrestee could endanger police or destroy evidence); *Vasquez v. State*, 990 P.2d 476, 489 (Wyo. 1999) (adopting a rule that is "a narrower application than *Belton*" and requires that a vehicle search incident to arrest be "reasonable under all the circumstances").

pursuits was totaled for states that, in a particular year, had rejected a rule allowing automatic searches of the vehicles of recent arrestees, in comparison to all other states. The number of assaults in each such state in a year was then divided by the total number of law enforcement officers in the state to account for the different sizes of police forces. The data thus serve as a rough proxy for the risk of assault during a traffic stop faced by an officer in each such state.[3]

Chart 1 shows the data nationwide and compares states that have rejected an automatic vehicle search rule to all other states. It illustrates that, in all but two of the last fifteen years, states that have *rejected* an automatic vehicle search rule have experienced *lower* assault rates on police officers than other states.[4]

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[3] Because the data involve assaults during all traffic stops and pursuits, it involves a larger number of assaults than are directly relevant to this brief's analysis, *e.g.*, assaults that occurred when there was a citation but no arrest, or when the assault did not involve a weapon recovered from the vehicle of an arrestee, or when the assault occurred during a pursuit which typically would not be when the arrestee is secured in the police car. Traffic stops that lead only to citations do not authorize an automatic search of the person or his vehicle. *See Knowles v. Iowa*, 525 U.S. 113 (1998). The data also are not restricted to assaults only by arrestees so that they include assaults by third parties as well.

[4] The number of states that have rejected an automatic vehicle search rule has fluctuated over time, so the analysis includes each state as it changed its laws. States that have operated under both standards during the time period for which

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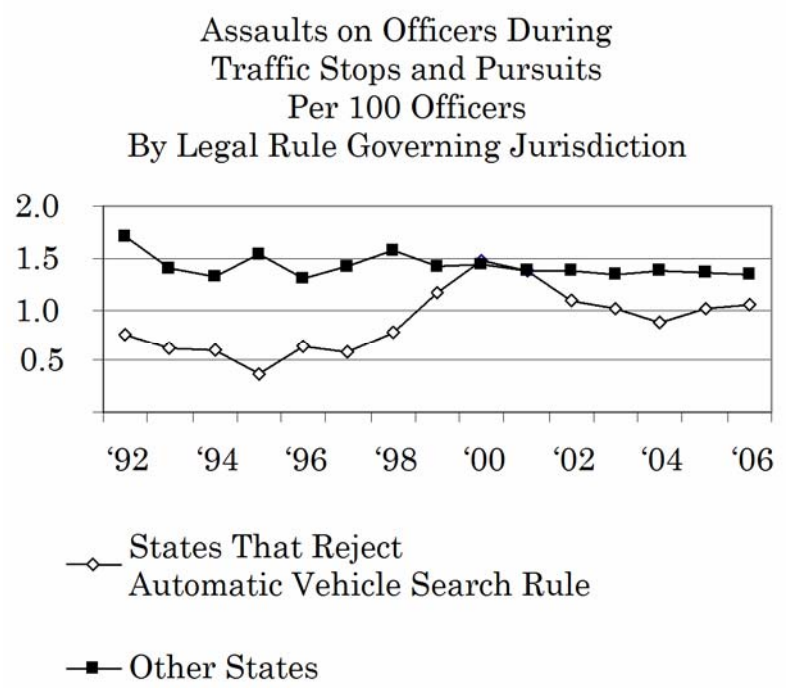
Chart 1



Of course, the data do not distinguish between the effects of the prohibition against automatic vehicle searches and the effects of a multitude of other factors on the number of assaults against police officers. But one can also look at the level of violence against law enforcement officers in each of those nine states outside of the context of traffic stops and pursuits to get a sense of the influence of the factors leading to assaults on officers other than those that

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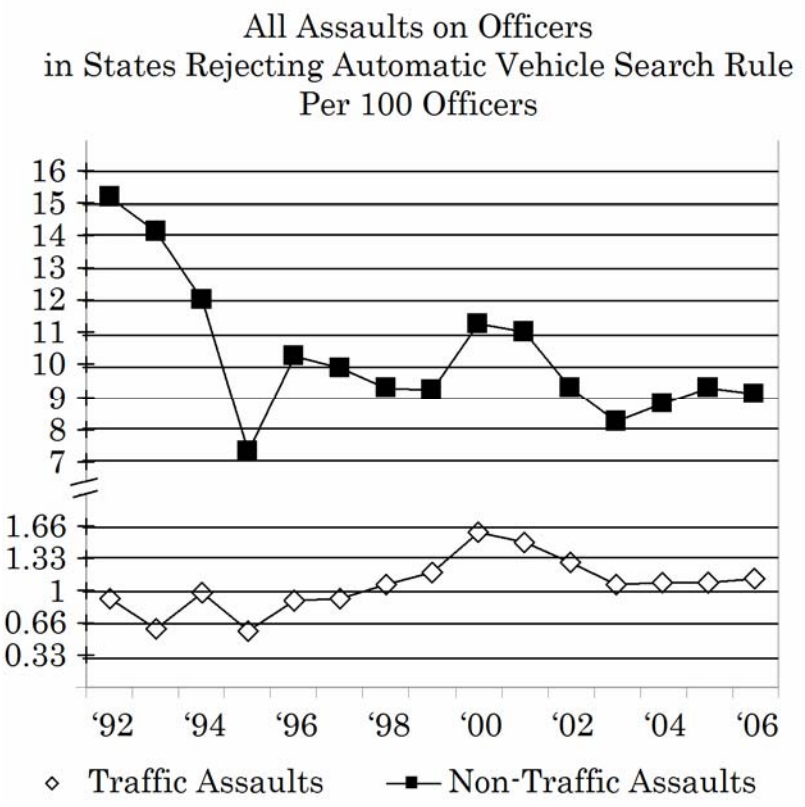
statistics are available are included in the appropriate category for the appropriate year. The FBI data underlying this chart and the following charts are provided at App., *infra*, 1a-3a.

may be unique to the traffic stop context. Chart 2 reflects that data, and it shows that the annual fluctuations for assaults against officers at traffic stops and at other encounters closely correlate. This suggests that the rejection of an automatic vehicle search rule did not lead to an increase in officer assaults in those states.

Chart 2



2. Data Are Available In Four Of The Nine States Before And After Their Express Rejection Of Automatic Vehicle Searches, And The Data Reveal No Subsequent Increase In Assaults On Officers During Traffic Stops

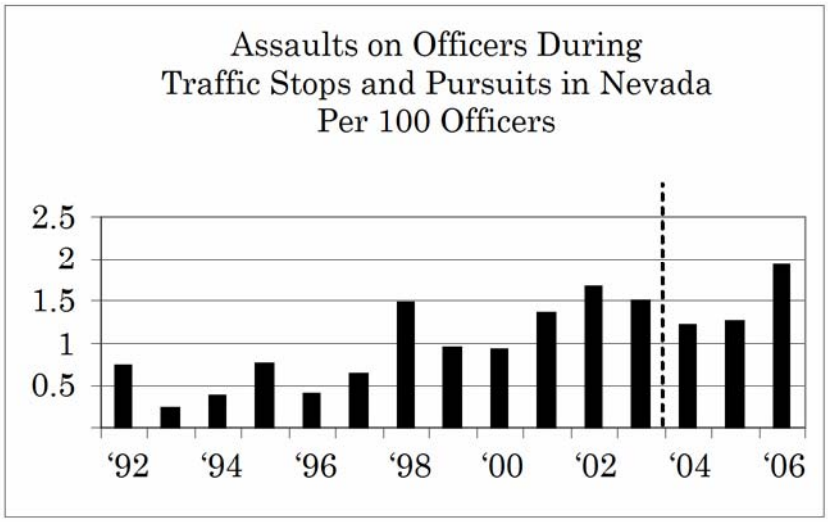
The FBI provided data on traffic assaults in years that extended both before and after the year of rejection of the automatic vehicle search rule in only four states—Nevada, New Mexico, Pennsylvania, and Wyoming.[5] The individual state data show that none of these states experienced a sustained upsurge in the number of assaults on police officers during traffic stops following the express prohibition against automatic searches of vehicles incident to arrest. In other words, the data do not support the result one would have expected if petitioner were correct in its claim that an automatic search rule is necessary to ensure officer safety.

This suggests that petitioner and its *amici* are wrong in contending that the risk of harm to officers increases if automatic searches are prohibited. Indeed, to the contrary, the charts below show, like Charts 1 and 2 above, that an automatic vehicle search

[5] In three of the nine states that have rejected an automatic vehicle search rule—Massachusetts, New York, and Oregon—the rejection of the rule occurred prior to 1992, which is the earliest year for which the FBI state-by-state data is available. In two other of the nine states—New Jersey and Vermont—the rejection of the rule permitting automatic searches occurred so recently that post-decision data are not available.

rule has no real effect on officer safety and that, instead, it is other factors, not that legal rule, that affect the rate of traffic-related assaults on officers during traffic stops. The varying rates of assaults during traffic stops from year to year in each of these four states below simply show that petitioner's automatic search rule finds no empirical foundation in a police officer safety rationale.

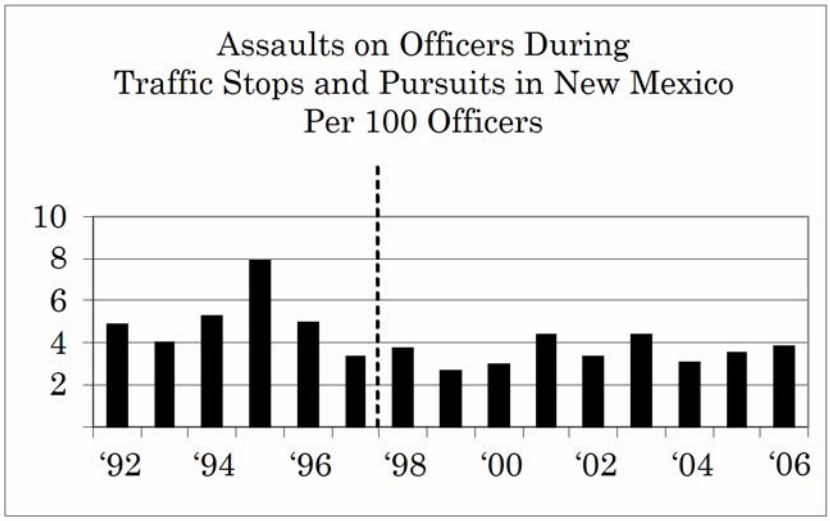
Chart 3



a. Nevada rejected an automatic vehicle search rule in 2003. *See Camacho v. State*, 75 P.3d 370, 373-374 (Nev. 2003). Chart 3 reflects that state's data and shows that immediately thereafter the rate of assaults on officers at traffic stops in fact decreased. The rate of assaults has increased in the years following, but that rate is approximately the same as it was in the years prior to rejection of the rule. Overall,

the data do not establish that there was a substantial increase in the rate of assaults on the state's officers during traffic stops after the state prohibited automatic searches of vehicles incident to arrests.

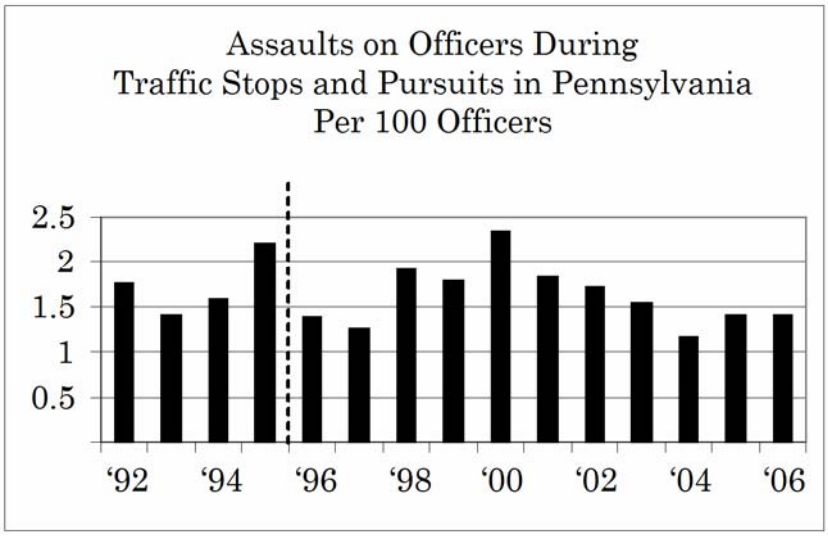
Chart 4



b. The rate of assaults on officers during traffic stops in New Mexico has generally remained similar before and after the state rejected an automatic vehicle search rule in 1997. *See State v. Arredondo*, 944 P.2d 276 (N.M. Ct. App. 1997). Chart 4 demonstrates that even though the rate of assaults on officers slightly increased immediately after *Arredondo*, rising from 3.3 assaults per 100 officers to 3.5 assaults per 100 officers, the average rate during traffic stops of assaults per 100 officers over the course of the nine years since the automatic search rule was rejected is 3.5, which is lower than the average rate of 5.0 assaults per 100 officers

experienced over the course of the five years before rejection of the rule.

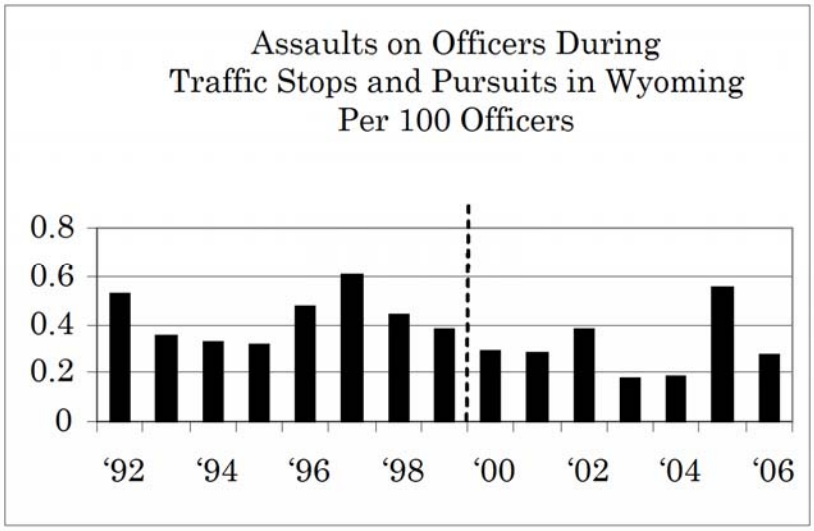
Chart 5



c. Pennsylvania experienced a decrease from 2.2 to 1.4 assaults per 100 officers during traffic stops in the year after it rejected an automatic vehicle search rule that had previously been applied by its lower courts. *See Commonwealth v. White*, 669 A.2d 896 (Pa. 1995); *see also*, *e.g.*, *Commonwealth v. Mickell*, 598 A.2d 1003, 1009 n.7 (Pa. Super. Ct. 1991). Chart 5 reflects that data. It also shows that in the years thereafter the rate of assaults gradually increased but that the rate has stabilized at a level that is lower than the rate of assaults in any of the four years preceding that decision. This overall decrease in rate of assaults has occurred even though police in

Pennsylvania have not had authority to conduct automatic vehicle searches incident to arrest for the past 13 years.

Chart 6



d. After Wyoming rejected an automatic vehicle search rule in 1999, *see Vasquez v. State*, 990 P.2d 476 (Wyo. 1999), the number of assaults per 100 police officers during traffic stops, which already had been decreasing, continued to decline as illustrated above in Chart 6. A subsequent rise (from .2 assaults per 100 officers to .6 per 100 officers) in 2005 immediately fell the next year (to .3 assaults per 100 officers), and the rate of assaults in 2006 was lower than that prior to *Vasquez*.

In short, the experiences of these four states suggest that prohibiting police officers from

automatically searching all vehicles incident to the arrest of a recent occupant does not increase the risk that such arresting officers will be assaulted during traffic stops. The data regarding the rate of assaults on officers during traffic stops before and after rejection of an automatic vehicle search rule appear to undermine petitioner's contention that having automatic vehicle search authority is necessary to protect officers from the dangers inherent in arrests during traffic stops. Pet. Br. 12, 27.

B. Evidence Preservation Does Not Require An Automatic Vehicle Search Rule Because Officers May Secure Vehicles On The Scene To Prevent Tampering And Because Officers Have The Means To Later Search The Vehicle When Constitutional Standards Are Met

Petitioner and its *amici* also urge this Court to adopt an automatic vehicle search rule based on a claim that a search is necessary to preserve evidence within the vehicle for collection by police officers, including evidence related to criminal charges other than those on which the arrest has been made. Pet. Br. 27.

But law enforcement officers are not entitled to conduct rummaging searches for evidence regardless of probable cause or exigencies. Nor is the automatic search of every vehicle recently occupied by an arrestee necessary for evidence preservation. Officers can protect potential evidence in a vehicle by securing the scene and preventing access to the vehicle during

the course of an arrest. Later, if there is probable cause to believe that the vehicle contains evidence or contraband, or if the police can meet some other recognized Fourth Amendment standard, they can search the vehicle and recover whatever evidence it may contain. Rejection of an automatic vehicle search rule therefore will not end all vehicle searches, as petitioner would lead this Court to believe.

1. To prevent the destruction of evidence at the time of the initial arrest of a former occupant of a vehicle, officers may secure the vehicle as part of a crime scene and thereby prohibit access to it. This Court has read the Fourth Amendment to permit officers to require drivers and passengers to exit a lawfully stopped vehicle. *Maryland v. Wilson*, 519 U.S. 408, 415 (1997); *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977). And police officers may continue to secure the vehicle "to preserve the status quo" while undertaking their law enforcement duties. *Cf. Segura v. United States*, 468 U.S. 796, 798 (1984) (after arresting occupants of a residence, officers can prevent access to the premises "while others, in good faith, are in the process of obtaining a warrant"). Securing a vehicle sufficiently mitigates any risk that the arrested person or third parties will destroy or tamper with any evidence that it contains.[6]

[6] Petitioner suggests that an automatic search is necessary because "unknown confederates" of the arrestee may seek access to the arrestee's vehicle. Pet. Br. 25. But petitioner and its *amici* do not cite any instances in which confederates of a handcuffed and secured arrestee invaded the scene and gained access to the

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2. After the former occupant of a vehicle is arrested and the scene is secured, other doctrines may permit police officers to search the interior of the vehicle and to preserve any evidence it contains. For example, a police officer may be able to conduct a visual inspection of the interior of a vehicle from a location outside of the car, and any evidentiary items in plain view can be seized and admitted at trial. *See, e.g.*, *Harris v. United States*, 390 U.S. 234, 236 (1968) (registration card, with name of robbery victim on it, was in officer's "plain view" once the door of the vehicle was lawfully opened).

Also, the police may obtain consent to search from the owner or operator of the vehicle and obtain admissible evidence pursuant to such a search. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219-220 (1973) (officers found evidence while searching trunk of lawfully stopped automobile pursuant to valid consent). It is not uncommon for those who have been detained or arrested in traffic-related encounters to consent to a search of the vehicle. *See*, *e.g.*, *Ohio v. Robinette*, 519 U.S. 33, 35, 40 (1996) (after being lawfully detained and issued a warning, defendant consented to a search that revealed marijuana in his vehicle); *see also People v. Mezon*, 140 A.D.2d 634 (N.Y. App. Div. 1988) (vehicle search not valid as

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vehicle in order to destroy evidence or to obtain a weapon to use against the arresting officers. In any event, where officers are concerned about "strange things" happening on account of other unsecured individuals, securing the vehicle to prevent access by others makes the most practical sense.

incident to arrest nor justified as an inventory search, but defendant consented to the search).

Furthermore, the police may have reason to impound the vehicle. In such circumstances, officers may have authority to conduct an inventory search of the vehicle which is done pursuant to "standardized criteria" and "on the basis of something other than suspicion of evidence of criminal activity." *Colorado v. Bertine*, 479 U.S. 367, 375 (1987); 3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 7.4(a) (4th ed. 2004) (it is "common practice for the police to conduct an inventory of the contents of vehicles they have taken into their custody or are about to impound"). And it may be that a more extensive search can subsequently be conducted if the officers develop probable cause to believe the vehicle contains evidence or contraband. *Cf. Florida v. Meyers*, 466 U.S. 380, 382 (1984) (per curiam).

In sum, petitioner has not established that the preservation of evidence requires intrusion on a person's remaining privacy interests in the contents of the vehicle by permitting an automatic search of every vehicle recently occupied by every arrestee. Indeed, the fact that nine states have rejected petitioner's rule and yet petitioner points to no data suggesting that there is an increased problem of evidence destruction in those jurisdictions undermines the claimed need for automatic searches as a means of preserving evidence.

C. Interpretation Of The Fourth Amendment To Not Allow Automatic Vehicle Searches After An Arrestee Is Secured Provides A Straightforward And Readily Manageable Rule

Petitioner repeatedly insists that the benefit of its automatic vehicle search reading of *Belton* is that it is a "bright line" that enables officers to conduct protective searches of vehicles incident to the arrest of former occupants without having to make case-by-case assessments of whether such a search is warranted by the threats or risks presented. Pet. Br. 12-14, 29-31. And petitioner mischaracterizes the ruling below as unmanageable, by contrast, because, in its view, the permissibility of a search under the Arizona Supreme Court's holding "depends on an arresting officer's *ad hoc* assessment that he is secure from danger and that evidence will not be destroyed." Pet. Br. 13.

Petitioner misconstrues the ruling below in two ways. First, a prohibition against automatic searches of vehicles incident to arrest of a recent occupant after the arrestee is secure is a straightforward and readily manageable rule. Second, a prohibition on automatic vehicle searches would not require *ad hoc* assessments that would somehow create chaos, but rather would likely lead to even more consistent results than the automatic vehicle search rule that petitioner advocates. It is, in fact, petitioner's automatic vehicle search reading of *Belton* that

involves *ad hoc* assessments about recent occupancy and related questions.

1. Prohibition of the automatic search of a vehicle as incident to arrest (*i.e.*, requiring officers to apply well established reasonableness standards of probable cause or exigent circumstances) after an arrested former occupant has been handcuffed and secured in the back of a police car will not require a cumbersome fact-specific analysis in every case. Rather, such a rule establishes a clear and consistent standard for officers to follow: no vehicle search incident to arrest after the arrestee is secured. Courts and commentators have noted that a prohibition against automatic vehicle searches draws a line that is every bit as "bright" as petitioner's automatic search reading of *Belton*, and one that is far more consistent with reality and prior precedent. *See State v. Eckel*, 888 A.2d 1266, 1277 (N.J. 2006) ("If any bright line had been necessary to resolve the issue in *Belton*, it would have been the *opposite* of the rule that the Court announced. * * * [O]ccupants almost invariably are removed before the automobile is searched; and once they have been removed, there is no longer much chance that they can secure weapons from the automobile or destroy evidence there." (quoting Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 274 (1984)) (emphasis added)).

A prohibition against automatic vehicle searches after arrestees are secured does not demand that officers "sift through a plethora of varying

circumstances to determine whether they have authority to search," Pet. Br. 14, to any greater degree than petitioner's automatic search reading of *Belton*. After all, under petitioner's rule, officers must determine, for example, whether an arrestee is a recent occupant of a particular vehicle to justify the automatic search, and that determination is far from obvious in many instances. By contrast, because it is clear when an arrestee has been locked in the back of a police car, it would be clear to officers to apply the rule that prohibits a search of a vehicle at that point, unless the general Fourth Amendment standards for searching the vehicle are met.

The relative ease of application of a rule that does not permit automatic searches of vehicles derives primarily from the fact that the arrest and securing procedures are typically standardized in virtually all jurisdictions. Indeed, law enforcement manuals often provide detailed instructions for handcuffing suspects, for conducting protective searches of arrestees' bodies, and for making sure that "prisoners are *secured* in the rear seat" of the police car. *See*, *e.g.*, Police Dep't, City of Cincinnati, Ohio, *Procedure Manual* § 12.600(D)(8) (rev. 2007) (emphasis added).[7] Thus, a rule that prohibits the

[7] *See also, e.g.*, Police Training Comm'n, New Jersey Div. of Criminal Justice, *Performance Objectives* §§ 10.6, 10.7, 10.9 (rev. 2006) (requiring that police officers conduct searches of people and vehicles safely and use handcuffs to prevent attack); Police Dep't, City of Lawrence, Kan., *Procedure Manual* § 00-70 (2006) (advising that all persons arrested be handcuffed or otherwise secured).

search of a vehicle after an arrestee is secured relies on a concept that is quite familiar to officers.

A rule against automatic vehicle searches after an arrestee is secure is also likely to produce predictable and consistent results, given that the relevant factor—whether or not the arrestee is secured—is based largely on circumstances that are controlled by the police themselves. Police officers have every incentive to follow whatever standardized steps their departments have delineated for making arrests and securing arrestees in order to protect themselves and third parties. And having done so, an officer will know that subsequent searches of the arrestee's vehicle are prohibited, except in those circumstances in which the officer reasonably determines that probable cause exists to believe that the vehicle contains evidence or contraband, or where there are exigent circumstances that pose a risk to the safety of the officer or others.

The argument that a rule against automatic vehicle searches when arrestees are secured would nonetheless be difficult for the police to implement in practice because it forces officers to choose between securing an arrested former occupant and conducting a vehicle search, *see Amicus* Br. of the Nat'l Ass'n of Police Org. at 3, mistakenly "assumes that, one way or another, the search must take place." *Thornton*, 541 U.S. at 627 (Scalia, J., concurring). Officers ordinarily protect themselves by securing suspects before undertaking other duties. *See*, *e.g.*, Police Dep't, City of Cleveland, Tenn., *General Orders*

Manual § 11-G (rev. 2007) (prisoners should be handcuffed before they are searched); Myron Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton*, 2002 WIS. L. REV. 657, 665-666, 675-676 (citing officer manuals that require officers to secure an arrestee before searching the area). Holding that a search of a vehicle incident to arrest can proceed only upon a showing of probable cause or exigent circumstances once an arrestee is secured mandates nothing different.

There is nothing unfair or unreasonable about a rule that means that officers must forgo the automatic search of a vehicle if they first secure an arrested suspect, because a search of a vehicle in the absence of probable cause does not occur at the officer's *option*—it is only authorized as a result of potential dangers that do not persist after the arrestee has been secured. *See Chimel*, 395 at 762-763. And "if an officer leaves a suspect unrestrained nearby just to manufacture authority to search, one could argue that the search is unreasonable *precisely because* the dangerous conditions justifying it existed only by virtue of the officer's failure to follow sensible procedures." *Thornton*, 541 U.S. at 627 (Scalia, J., concurring) (emphasis in original).

2. Petitioner's automatic vehicle search rule requires several determinations that are not always easy for officers to make. This is because, as petitioner admits, vehicle searches under the automatic search reading of *Belton* are "limited"

based on factors such as how close the arrestee is to the car and the timing of the search. Pet. Br. 28. Those factors may be key to determining whether an arrestee is a "recent occupant" of a vehicle under *Thornton* and whether a search is "contemporaneous" and incident to an arrest. But questions of proximity and temporality can be difficult to gauge.

As respondent documents, courts and officers struggle with assessing spatial and temporal proximity for the purpose of deciding whether an arrestee is a "recent occupant"—with inconsistent and unpredictable results. Resp. Br. 39-41. Indeed, "[s]ince *Thornton*, federal and state courts have been sharply divided over what distance constitutes sufficient spatial proximity between the arrestee and the vehicle for the arrestee to be considered a recent occupant * * * ." *United States v. Caseres*, No. 06-50546, 2008 WL 2841159, at *5 (9th Cir. July 21, 2008). There is no standard measure of temporal proximity either. *See id*. at 18. And the fact-specific determinations that are required to determine "how recent is recent, or how close is close," *Thornton*, 541 U.S. at 636 (Stevens, J., dissenting), have now resulted in Fourth Amendment case law regarding searching of vehicles incident to arrest that "reads something like, 'well, thirty-minutes is too long, but five minutes is okay and you can delay if you are filling out paperwork but not if you are interrogating or transporting the defendant.'" *United States v. McLaughlin*, 170 F.3d 889, 895 (9th Cir. 1999) (Trott, J., concurring).

Consequently, in practice, petitioner's automatic vehicle search rule is no "brighter" than a Fourth Amendment rule that prohibits the automatic search of a vehicle after the suspect has been arrested and secured and that requires, instead, that well established Fourth Amendment reasonableness standards such as probable cause or exigent circumstances be met. Indeed, the latter rule is more straightforward and likely easier for officers to implement.

CONCLUSION

For the reasons set forth above, and in respondent's brief on the merits, the Court should affirm the judgment of the Arizona Supreme Court.

Respectfully submitted,

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JULY 25, 2008

Total Assaults on Law Enforcement Officers

	United States	MA	NV	NM	NY	OR	PA	WY
1992	81150	1421	241	857	6486	690	2985	117
1993	62933	1343	180	558	5780	468	1902	82
1994	64967	1119	235	308	4745	567	2349	53
1995	57762	1085	250	671	2652	355	1825	60
1996	46608	851	295	307	4757	467	1749	52
1997	52149	825	346	608	4621	527	1742	59
1998	60673	744	454	535	4054	422	2471	54
1999	55971	518	467	503	1452	506	2603	50
2000	58398	522	509	538	1464	496	2817	49
2001	57463	1313	447	474	1101	412	2553	53
2002	59526	337	467	571	451	354	2374	74
2003	58600	510	477	436	899	409	2339	60
2004	59692	172	457	672	705	322	2631	57
2005	57820	147	466	806	722	373	2702	61
2006	59396	168	602	713	604	351	2899	58

Table drawn from unpublished data collected by FBI as part of the Uniform Crime Reporting Program. Published summaries of assault data appear in the FBI's annual report, *Law Enforcement Officers Killed and Assaulted*, available at www.fbi.gov/ucr/ucr.htm#leoka.

Assaults on Law Enforcement Officers During Traffic Stops and Pursuits

	United States	MA	NV	NM	NY	OR	PA	WY
1992	7248	90	19	97	289	65	304	6
1993	5511	58	6	62	251	44	203	3
1994	5766	80	12	77	207	69	232	3
1995	5780	71	22	180	144	44	179	3
1996	4321	70	14	69	210	53	199	4
1997	5118	52	24	70	221	48	157	6
1998	6387	49	57	99	208	47	293	4
1999	6380	39	39	86	159	64	303	4
2000	6499	33	41	74	160	40	372	3
2001	6501	107	56	97	128	42	297	3
2002	6667	29	61	93	24	43	320	4
2003	6521	37	60	85	108	47	280	2
2004	6602	19	53	110	82	34	207	2
2005	6405	15	54	127	83	37	253	6
2006	6581	16	98	96	91	39	256	3

Table drawn from unpublished data collected by FBI as part of the Uniform Crime Reporting Program. Published summaries of assault data appear in the FBI's annual report, *Law Enforcement Officers Killed and Assaulted*, available at www.fbi.gov/ucr/ucr.htm#leoka.

Number of Law Enforcement Officers

	United States	MA	NV	NM	NY	OR	PA	WY
1992	456177	7642	2563	2010	46818	3863	17262	1137
1993	424054	9793	2540	1537	43553	3681	14394	858
1994	469426	10216	3166	1468	45450	4146	14579	934
1995	428379	11381	2880	2267	55200	4090	8064	951
1996	371964	8828	3464	1397	54242	5007	14429	849
1997	411015	12746	3747	2113	53398	4258	12502	987
1998	452361	11675	3847	2672	56430	4695	15249	903
1999	462782	12903	4123	3247	18146	4704	16896	1057
2000	452531	5615	4433	2488	17565	3734	15937	1039
2001	471096	10509	4096	2208	14781	3894	16183	1055
2002	491009	3852	3678	2797	17869	3423	18584	1050
2003	501738	12727	4002	1960	17493	3938	18112	1111
2004	501462	3663	4372	3593	23606	4222	17908	1077
2005	489393	3572	4299	3575	23283	3557	18121	1077
2006	504147	3294	5113	2532	22500	3785	18331	1110

Table drawn from unpublished data collected by FBI as part of the Uniform Crime Reporting Program. Published summaries of assault data appear in the FBI's annual report, *Law Enforcement Officers Killed and Assaulted*, available at www.fbi.gov/ucr/ucr.htm#leoka.